



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

SUCCESSION CAUSE NO. 274 OF 2012

In The Matter Of The Estate Of Baranaba M' Arithi M' Rubucha Alias Baraba M' Arithi (Deceased)

ANDREW RIUNGUB. M' ARITHI.....PETITIONER

JUDGMENT

[1] This succession cause relates to the Estate of Baranaba M' Arithi M' Rubucha (deceased). By Summons for Confirmation of Grant dated 11th February 2014, the Petitioner sought to distribute the estate of the deceased as follows:

L.R NO. ABOGETA/U-KIRINGA/54 MEASURING 13 ¼ ACRES

- a). GRACE MUTHONI LUKA-1 ½ acres
- b). ANDREW RIUNGU B M' ARITHI-4acres
- c). EVANGELINE TIRINDI JOSPHAT-1acre
- d). CECELIA KIAJIA MBAE-2 ½ acre
- e). GERMAN KINYUA-2 ½ acre
- f). JOY STELLA KAGWWIRIA B M' ARITHI-1 ½ acres

[2] The Protestor opposed the proposed mode of distribution by the Petitioner. She contended that she was a daughter in law to the deceased and a beneficiary to his estate and that proposed mode of distribution by the Petitioner was contrary to the wishes expressed by the deceased, beneficiaries and or dependants agreement on distribution.

[3] When the matter came up for hearing on 25th July 2016, the court directed the Protestor to file and serve further affidavit and documents within 30 days. On 22nd March 2017, Mr. Gichuki holding brief for Mr. Mbaya for the protestor informed court that they had not reached their client and requested for more time to comply. The court gave him the last chance to comply. On 18th July 2017, Mr. Mbaya for the protestor intimated to court that they would call *viva voce* evidence and file witness statements. As at 29th November 2017, they had not complied with the orders of 18th July 2017. Again, despite default, the court extended kind indulgence to them for the last time and were directed to file their statements within 14 days.

[4] When the matter came up for hearing on 30th July 2018, the protestor and her advocate were absent. Mr. Mutegi for the petitioner urged the court to dismiss the protest for want of prosecution. I will however determine the case on merits.

ANALYSIS AND DETERMINATION

[5] I have carefully considered the summons, the witness statement filed by the petitioner and the affidavit of protest by the Protestor.

[6] According to affidavit in protest to confirmation of grant by Evangeline Tirindi Josphat sworn on 4th March 2015 and filed on the same day, she is the wife of Josphat Mutea Gitonga (also deceased) who is a son of the deceased to whom these proceedings relate, i.e. Baranara M' Arithi M' Ribucha. Josphat Mutea Gitonga was survived by-;

(1) Evangeline Tirindi Josphat -(widow)

- (2) **Philipine Igoki Josphat - Daughter**
- (3) **Jane Nkuene Josphat - Daughter**
- (4) **Lydia Kawira Josphat - Daughter**
- (5) **Domenika Mukami - Daughter**
- (6) **Maurice Bundi Gitonga - Son.**

[7] She stated that the deceased left behind one parcel of land to wit **L.R NO. ABOGETA/U/KIRINGA/54** measuring 13 ¼ acres. She states that the deceased had demarcated his land and distributed the parcels thereof to his sons who took actual possession and continuously developed their respective portions which are distinctly marked. She annexed a report by Thagishu & Associates, Licenced Land Surveyors to establish how the beneficiaries are settled on the land. She stated that all the sons of the deceased have in turn shared out portions of their share to their children.

[8] She stated that according to the family and clan elders meeting of 17th Mach, 2011 the land parcel No. L.R Abogeta/U-Kiringa/54 is supposed to be distributed as follows-;

- 1. Luka Muriungi – SON – 1 ACRE**
- 2. Andrew Riungu – SON – 4 acres.**
- 3. Evangeline Josphat – (wife to the deceased son Josphat – 2 acres**
- 4. Cecilia Mbae – Wife to the deceased son Mbae – 2.05 acres**
- 5. German Mbae – Son – 2.5 acres**
- 6. Joy Stella Kagwiria – Daughter 1 – acre**
- 7. Roselia Kagwiria – Daughter - None.**

[9] She averred that in the alternative, the estate should be shared equally amongst all the beneficiaries. She annexed minutes of the said meeting which was marked EJG1.

[10] The petitioner's case was that the deceased shared his land through a written will in 1991. He put into effect his said will through oral distribution of portions of his land to his children in the following manner:-

- 1. Luka Murungi- son- 1 acre
- 2. Andrew Riungu- son- 6 acres
- 3. German Kinyua- son- 4 acres
- 4. Parrasio Mbae- son- 1 acre
- 5. Barnaba M'Arithi- owner- 1 ¼ acres for his daughter Joystella Kagwiria
- 6. Evageline Tirindi Josphat- 1 acre

[11] He stated that in the said meeting, Evangeline was not present but was represented by Parkrasio. He also stated that Evangeline and Parkrasion shared land number 167 = each getting 2 1/ Acres thus these tow were given 1 acre each in the estate property.

[12] He says that his proposed mode of distribution was not contrary to the wishes of the deceased as the deceased had left another piece of land in his trust to wit, No. ABOGETA/U-KIRINGA/167 which was meant to be shared between Evangeline Tirindi and Cecilia Mbae both of whom husbands had died.

[13] I have looked for written will and I find none in these proceedings. If a will existed, the petition ought to have been filed with will annexed. And, law on testacy would have applied. However, this estate is intestate and I will therefore treat and deal with it as such.

[14] Having said that, matters of the alleged written will do not hold any water. From the arguments and words by the petitioner, the father carried out "oral distribution" of portions of his land. I do not know whether he meant oral will or merely wishes of the deceased. If he meant oral will was made, he did not prove oral will as per the requirement of the law. See section 9 and 10 of the Law of Succession Act. The onus of proving oral will by or wishes of the deceased was on the petitioner and that obligation is not lessened merely because the protestor did not file submissions or witness statements. The meeting alluded to but which was not attended by the Protestor was not proved.

He and his witnesses made bare statements that a meeting was held in which the deceased shared out his land. The demarcations on the ground are in controversy. See the annexure by the Protestor by Thagishu Surveyors. Therefore, the distribution by the petitioner is not supported by evidence to have been a reflection of the wishes of the deceased.

[15] Similarly, although the protestor annexed minutes of a meeting by clan elders and family members, the forum does not have jurisdiction to distribute the estate of the deceased. Therefore, I reject the proposal. But I gathered from her protest that she lives in the estate herein.

[16] Before I close, I wish to tackle one little yet important matter; the allegation that land parcel number 167 belonged to the deceased and had been registered in the name of the son of the deceased, now late Josphat Gitonga. The said land is subject of Meru Succession Cause No. 512 of 2008 in respect of the estate of JOSPHAT MUTEA MÁRITHI. All arguments on that estate should be canvassed in that cause but not here. Parties will get justice in the said cause. Importing matters of the said cause here is simply causing confusion and wasting court's precious time. I say so because the grant therein is already confirmed and cannot be re-opened through this cause. Therefore, the less I say about the cause the better.

[17] In light of what I have stated, I will resort to the law. The deceased died and left no spouse but children. Therefore, section 38 of the Law of Succession Act applies. In accordance with the principle of equality therein, I direct that the estate property to wit **L.R NO. ABOGETA/U/KIRINGA/54** measuring 13 ¼ acres shall be shared equally amongst the following beneficiaries:-

- a) **GRACE MUTHONI LUKA on behalf of the estate of LUKA MURIUNGI**
- b) **ANDREW RIUNGU B M' ARITHI**
- c) **EVANGELINE TIRINDI JOSPHAT on behalf of the estate of JOSPHAT GITONGA**
- d) **CECELIA KIAJIA MBAE on behalf of the estate of PARGRASIO MBAE**
- e) **GERMAN KINYUA**
- f) **JOY STELLA KAGWWIRIA**

[18] The grant is confirmed in the foregoing terms. This being a succession matter there will be no order as to costs.

Dated, signed and delivered in open court at Meru this 24th day of January, 2019

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F. GIKONYO

JUDGE

In presence of:-

Ngugi for Kirimi for petitioner

Petitioner - present

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F. GIKONYO

JUDGE